STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODRIQUEZ McKENZY,

Defendant-Appellant.

UNPUBLISHED
January 30, 2001

No. 219278
Wayne Circuit Court
LC No. 98-006861

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

A jury convicted defendant Rodriquez McKenzy of involuntary manslaughter[1] after it heard evidence that McKenzy engaged in a fist-fight with another man, killing him. The trial court sentenced him to nine to fifteen years in prison and ordered him to pay $7,445 as restitution before he would be eligible for parole. McKenzy appeals as of right. We affirm.

I. Basic Facts And Procedural History

In the early morning hours of June 1, 1998, McKenzy, who had been drinking, and his friend attracted the attention of a passing automobile driver, who was acquainted with McKenzy's friend. McKenzy and his companion asked the driver if he would drive them home. The driver agreed to do so for $12. When McKenzy got in the car, he dozed. Some time later, the driver woke McKenzy and told him that he could not take him any further because McKenzy's friend, who was no longer in the car, had taken all of McKenzy's money. After McKenzy demanded to be taken to his home or to his friend's home, a fist-fight ensued. McKenzy beat the driver unconscious and left him on the sidewalk; McKenzy told police that "I knocked [the driver] downs as he was getting back up. I kicked him a couple of times and he went back down." The driver went into a coma and died of his injuries a few days later.

John Scott Sommerset, M.D., a forensic pathologist and assistant medical examiner for Wayne County, testified that the autopsy revealed that the driver's death resulted from "being kicked in the head with a shoe." Dr. Sommerset said that the driver had four severe contusions to

[1] MCL 750.321; MSA 28.553.

the head and eight or nine fractured ribs. The fractured ribs were beneath a pattern bruise that was consistent with the driver being kicked while lying on the ground. He concluded that the manner of death was homicide; the cause of death was multiple injuries, with severe injuries to the head.

The trial court instructed the jury on second-degree murder, which was the charged offense, as well as involuntary manslaughter, which is a lesser included offense, and self-defense in accordance with the theory of the defense. The jury rejected the second-degree murder charge and the self-defense theory, but convicted McKenzy of involuntary manslaughter. On appeal, McKenzy claims that his conviction should be reversed because the prosecutor committed misconduct during closing arguments.[2]

II. Standard Of Review

McKenzy failed to preserve this issue for appeal by objecting to the statements he now challenges.[3] Accordingly, he may only be granted relief if he can demonstrate that these statements constituted plain error that affected his substantial rights, meaning that any error was so prejudicial it controlled the outcome in this case.[4]

III. Prosecutorial Misconduct

This Court reviews claims of prosecutorial misconduct to determine whether the prosecutor's remarks denied the defendant a fair trial.[5] The comments that are challenged must be viewed as a whole and evaluated in light of the context in which they were made.[6] This context includes the arguments by the defense as well as the evidence adduced at trial.[7] The prosecutor is entitled to argue freely, using even forceful language, if the evidence supports the argument.[8] Within certain boundaries, phrasing may even be emotional.[9] Ordinarily, the remedy

[2] In the conclusion to his brief, McKenzy argues that "if [defense] counsel's failure to immediately object [to the alleged instances of prosecutorial misconduct] is somehow dispositive of this case, then counsel was ineffective in his representation" and this Court should reverse his conviction based on that ineffective assistance of counsel. As the following discussion explains, there was no prosecutorial misconduct. As a result, objecting would have been futile and there is no basis from which to conclude that defense counsel at trial was ineffective. See, generally, *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). Furthermore, McKenzy failed to present this issue for appeal by relating it in the statement of questions presented in his brief. See MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Accordingly, we give this issue no more attention.

[3] *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

[4] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[5] *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[6] *Id*.

[7] *Schutte*, *supra* at 721.

[8] *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

[9] *Id*.

for a prosecutor's improper arguments is for the trial court to correct the prosecutor and take any additional steps that are necessary, such as a curative instruction.[10]

IV. McKenzy As The Aggressor

McKenzy first claims that the prosecutor committed misconduct several times by arguing that he was the aggressor in the fatal fight. In relevant part, the prosecutor stated:

> He [McKenzy] tells you, and I asked him about his statement and he said, he said this, I told Bobby [the driver] he better take me home or take me around to Sweet Pea's [McKenzy's friend's] house. Bobby said he would give me two dollars back, but he was not going any further. Bobby told me to get out of the car and he reached over the back seat and tried to open the door. I tried to take his keys. I tried to take his keys. I tried to take his keys.
>
> Mr. McKenzy, Mr. McKenzy was the aggressor, Ladies and Gentlemen. Mr. McKenzy was the aggressor. He was angry because he wanted a ride home. He didn't want the two dollars back, but he wanted a ride home. He was so angry that he beat Mr. McKenzy [sic: the driver].

There was factual support for this argument. The evidence showed that the driver attempted to get McKenzy to leave his car peacefully. However, McKenzy rebuffed these efforts in his attempt to snatch the car keys from the driver and he "grabbed" the driver. While this evidence of McKenzy's role as the aggressor may have been debatable, there was enough evidence to submit to the jury on this issue, making the prosecutor's argument proper.

Furthermore, the prosecutor had an appropriate legal context in which to make this argument. Because there was evidence that McKenzy had sustained some minor injuries in the altercation, he was able to claim that he acted in self-defense.[11] This claim then shifted the burden of going forward to the prosecutor to prove beyond a reasonable doubt that McKenzy was an aggressor who did not act in self-defense.[12] In other words, a defendant who kills when acting on an honest and reasonable belief that his life was in imminent danger or that he was facing a threat of imminent serious bodily harm cannot be convicted of homicide.[13] However, if the defendant is the initial aggressor, then perfect self-defense is not available as a defense.[14] Thus, in order to disprove McKenzy's self-defense claim, the prosecutor had to argue to the jury that it could convict him because the evidence showed that he started the physical fight that led to the driver's death. This relationship to the arguments the defense posed to the jury made the

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[10] *Id*. at 679.

[11] See *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993).

[12] *People v Jackson*, 390 Mich 621, 626; 212 NW2d 918 (1973).

[13] *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990).

[14] *Id*. at 509.

prosecutor's arguments on aggression not only permissible, but necessary.[15] We conclude that there was no error on this point, much less an error that determined the outcome in this case.

V. McKenzy's Duty To Retreat

McKenzy also argues that the prosecutor misstated the law by informing the jury that, in order for McKenzy's claim of self-defense to succeed, he must have been in a position where it was not safe to retreat. Specifically, the prosecutor stated:

> You see, Ladies and Gentlemen, there are situations where a person can kill someone and it is justified . . . .
>
> If a person is defending himself, and the Judge is going to explain that it is not carte blanche, there are times and places to and reasons when self-defense is justified. And you're going to hear, Ladies and Gentlemen, based on the instructions from the Judge this is not one of them because the Judge is going to tell you before a person can use deadly force he must be responding, first, to deadly force. Two, he must not be in a position where he can retreat safely.
>
> In other words, Ladies and Gentlemen, even if you are in a deadly situation, if a person presents deadly force to you and you can remove yourself from that situation safely, you do not legally have the right to kill that person, so it would not be justified.

We see no error in this general statement concerning retreat. Ordinarily, before a person may use deadly force to defend himself, he must retreat if he can do so safely.[16]

The exceptions to this rule of retreat include attacks that occur in the defendant's home,[17] attacks that occur against a security guard acting in the course of employment,[18] or attacks against a driver by a hitchhiker in the driver's vehicle.[19] Although these exceptions broaden the original rule somewhat, none of the circumstances that would merit extending self-defense to those occasions exist in this case. McKenzy was not effectively trapped, as would be a driver who offers a ride to a hitchhiker who in turn is violent. He had no duty to act like a security guard, who must protect others as part of his employment responsibilities. And he was not in a place assumed to be safe, such as a home. Rather, at the time of the attack, he was on a street, two block away from a friend's home. His testimony also indicates that he had the opportunity to retreat. As he said, "I knocked . . . [the driver] down as he was getting back up. I kicked him a couple of times and he went back down."

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[15] *Schutte, supra* at 721.

[16] *People v Stallworth*, 364 Mich 528, 535; 111 NW2d 742 (1961).

[17] *Id*. at 535

[18] *People v Johnson*, 75 Mich App 337, 342-343; 254 NW2d 667 (1977),

[19] *People v Crow*, 128 Mich App 477, 489; 340 NW2d 838 (1983)

Moreover, having already incapacitated the driver, the force McKenzy used was unnecessary force.[20] As the forensic pathologist testified, the autopsy revealed injuries consistent with McKenzy kicking the driver while he was already lying on the ground. Again, the prosecutor's remarks were proper because they addressed the theory of the defense. There were not equivalent to a plain error affecting McKenzy's substantial rights.

VI. Harmless Error

Even if the prosecutor had committed misconduct in closing arguments, any error was harmless because the trial court instructed the jury only to consider the evidence in making its determination. The trial court also defined the nature of evidence and affirmatively stated that the arguments by counsel were not evidence, but were designed to help in understanding the evidence and each side's legal theories. We generally presume that juries follow plain instructions, such as these.[21] Moreover, the trial court's instructions regarding the duty to retreat dispelled any prejudice.[22]

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Patrick M. Meter

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[20] *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

[21] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[22] *Schutte*, *supra* at 721-722, quoting *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).